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Citation for published version:

Shaw, J, *Scottish Citizenship: Now is the Time to Start Discussing It*, 2012, Web publication/site, CITSEE.
<<http://citsee.eu/citsee-story/scottish-citizenship-now-time-start-discussing-it>>

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Publisher Rights Statement:

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Scottish citizenship: now is the time to start discussing it

Jo Shaw



I was recently invited to give evidence before the Scottish Affairs Select Committee of the House of Commons. The Committee is conducting an inquiry into [The Referendum on Separation for Scotland](#), and the evidence session on 5 September 2012 is [available to view](#). The evidence session has also attracted

some press coverage in the Herald ([article](#) and [leader](#)) which highlights the importance of the issue.

The comments here are based on the points made in my oral presentation and on questions from members of the Committee. They also include a number of points emphasised during the Q&A and which deserve closer attention or clarification. They are not detailed explanations of all the issues raised, but rather key points that could usefully be followed up during any future debate. Although the evidence session ranged across issues of immigration as well as citizenship and nationality, these comments do not cover the immigration related issues, which deserve separate treatment.

We don't know much at present about the detail of any proposals regarding citizenship status in the event of a 'yes' vote for independence in any referendum. The Scottish Government mainly refers to the residence base as defining who are the people of Scotland, but doesn't clarify whether being a UK citizen at present would be a first condition to becoming Scottish. It also hasn't stated what would be the expectation of any invitation to opt in to Scottish citizenship by those born in the territory, or with long prior residence, who have now left. Now could be the time to start thinking through some of the implications of this, and to bring to bear insights from previous research on new citizenship regimes, such as that which we have undertaken in [CITSEE](#).

Why it matters? The purposes and nature of citizenship laws

Citizenship laws have a number of purposes, including the assurance of a stable population, and the transmission of 'membership' across generations. Factors such as patterns of immigration and emigration are amongst the historical and demographic contingencies that tend to affect the choices that states make on such questions. Questions of identity and how a nation defines itself – e.g. by reference to ethnic belonging or by reference to a sense of civic belonging within a pluralist and multicultural community based on *residence* (which seems to be the current [Scottish Government's proposal](#)) – are also important. Typically a mix of factors affects the rules under which citizenship is acquired and lost, and the fact that a state is a 'new' state will be another variable that is likely to be influential over a period of time after independence as the citizenship definition 'beds in'. The 'death' of national citizenship is often announced (i.e. that it is becoming unimportant), but never in practice seems to occur. Citizenship continues to be practically and symbolically important for states, even in the context of EU membership. Citizenship encompasses several key elements of status, rights and identity. In relation to rights, many states now routinely give most rights historically granted to citizens alone also to all those who are lawfully on the territory (e.g. many rights to welfare). Increasingly the boundary lines between citizens and non-citizens are blurred. However, rights to vote in national elections are retained in most states by citizens alone, although the UK and Ireland with their now [reciprocal arrangements](#) are an exception to that pattern.

Who is a citizen? Initial determination of citizenry and rules of acquisition and loss

A distinction needs to be drawn between the initial determination of the citizenry and the rules of acquisition and loss of citizenship after independence. One of the tricky questions is who determines who are the citizens? In the absence of a state, there is no '*demos*' (i.e. people) to say who are the citizens in the future, and who can vote – as well – in which elections (resident citizens? non-resident citizens? resident non-citizens?). Clearly these are issues that need to be a part of any pre-referendum debate. Comments about the franchise for the referendum and the intersection between this and the initial determination of the citizenry and the subsequent determination of both the franchise and the ongoing rules on acquisition and loss of citizenship follow below.

Initial determination raises two questions, namely who votes in any referendum that might drive a process of separation forwards, and second, who would be defined as citizens at the moment of separation and

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would thus participate in the first and subsequent democratic elections (assuming that these are confined to citizens). In states where a concept of citizenship has evolved over centuries (Disqus of concepts of Facebook Social Plugins Google Analytics Twitter Button subjecthood), the basic scope of the citizenry was established so long ago that the concept of citizenship is happening (and indeed it probably did not happen at a point in time when modern citizenship in its current form actually existed).

Rules of acquisition and loss are required by all states, whether new or old, but they have a particular meaning in the context of newly established states, and in some cases have been the subject of various types of manipulation or ‘engineering’. The experience of the new small states of the former Yugoslavia has shown that political elites can continue to manipulate the rules of acquisition and loss, and consequential political and socio-economic rights attached to citizenship, in problematic ways many years after a state is first established. This can be a particularly difficult question where there are many, or potentially many, *external* citizens who are not resident in the territory. For states with relatively small electorates, these issues of electoral calculus can be challenging waters for new states to navigate if they want to avoid making the limits of citizenship too inclusive or too exclusive.

Substantively, any new state must make certain choices about defining the new citizenry *ab initio* and then determining – for the future – how citizenship is acquired and lost. There are various factors to be taken into account in establishing both sets of rules, if the decisions about who will become citizens are not to be seen as being over inclusive or over exclusive. We could identify the core elements of the menu of options, across which choices would be made about the scope of the citizenry, as follows:

For the initial determination of the citizenry, what degree of connection with Scotland will be demanded for a person to be defined as a Scottish citizen?

- Birth in the territory (but what about long periods of residence away?)
- Residence in the territory (when? For how long? Must it still be subsisting?)
- Consanguinity to those born or residing in the territory (how close? Across how many generations is citizenship transmitted to the children of expatriates?)
- Is prior UK citizenship an underlying condition to be included in the initial body of Scottish citizens, or can either EU citizens or third country nationals resident (or born) in Scotland acquire Scottish citizenship (e.g. by long residence) despite the fact that they may have chosen not to take UK citizenship?

For the rules on acquisition and loss of citizenship after independence, a distinction needs to be drawn between acquisition:

- At birth (whether on the basis of birth in the territory, or birth to parents who hold Scottish citizenship, or a combination of the two factors)
- After birth (naturalisation of immigrants; possible facilitated naturalisation for returning diaspora)

Citizenship acquisition *at birth* tends to be an automatic, involuntary and unconditional process, although in some circumstances a registration process may be required. But acquisition *after birth* is not only a voluntary act (one must apply for citizenship) but it also tends to be conditional. So, for example, immigrants must satisfy conditions such as length of residence, probity tests, integration/language tests, possible oaths of allegiance or loyalty tests, and fees. There is also generally a discretionary element for most naturalisation processes.

One of the peculiarities of the process of creating a new state which needs to be emphasised is that it is (for the new citizens) a case of citizenship acquired *after birth*, but with the element of automaticity

(because of the operation of the definitions contained in the law) which is more akin to the acquisition of citizenship *at birth*. It is therefore important to point out that the determination of new Scots on independence would normally happen automatically by law (perhaps in a new Scottish constitution), but there would be no necessary implication that individuals would have to choose to *exercise* their Scottish citizenship (e.g. by registering as a Scottish citizen, by taking a Scottish passport, or by exercising some other (e.g. socio-economic) right that was exclusive to Scottish citizens). The interaction between new Scottish citizenship and old UK citizenship (perhaps transformed into a new 'Rest-of-UK' ((R)UK) citizenship in the event that the rump state is also seen as a new state) will thus be crucial and is discussed in more detail below.

The high levels of mobility between Scotland and the rest of the UK, both recently and historically (and resulting large numbers of cross-national families), as well as emigration outside the UK over many generations, means that determining the first generation of Scots will involve very tricky choices about the level of connection required. A large number of external citizens can be a de-stabilising factor for a new state, but in any event the existence of a potential pool of external citizens, even if they are not granted citizenship in the first 'cut' (if the first cut is entirely residence based which seems likely to be the proposal emanating from the Scottish Government), can also have an influence on party politics and political interests after independence, because they often lobby to be included or given facilitated naturalisation rights (with or without residence), and are seen as likely to reward, in electoral terms, those who respond to the lobbying by campaigning for citizenship laws to be more externally inclusive. These processes have been observed in a number of states in central and eastern Europe and in the new states in South East Europe (e.g. Hungary and Slovenia), where access by external citizens to citizenship and to the right to vote has been widened over the years since democratisation and independence. By the same token, it is worth noting that the (R)UK would face having a large number of (potential) external citizens as a result of the changes to the territory of this state and this could have significant impacts because of the interface with external voting rights (limited to 15 years in the UK at present).

Internal inclusivity is influenced by Scotland's putative membership of the European Union, and also by the subsisting electoral rights (to vote in Scottish Parliament elections) enjoyed by EU citizens resident in Scotland at the present time and the proposal that this group should also be included in the referendum franchise. The Scottish Government consultation document suggests that the decision to use this inclusive franchise should be derived from the principle under which it suggests that the 'people of Scotland' should be seen as those who are *resident* in Scotland. This is a residence-based notion of 'people', rather than one based on blood or other connection to Scotland.

Constraints: the EU factor and international human rights law

A Scottish separation would be a unique event in the history of new state creation. The factor that makes it unique is that it would be the first case of the break up of an EU Member State, with both states aspiring – we assume – to EU membership. It is, of course, true to say that some of the state break-ups that have occurred in Europe since 1989, such as the dissolution of Czechoslovakia, the independence of the Baltic states, and the break up of Yugoslavia, have occurred under the *shadow* of EU law. But it is clearly going to be a different type of situation where the existing state is already a member of the EU, both succeeding states are likely to aspire to continued and uninterrupted membership, there are EU citizens exercising their EU citizenship rights in both states (and citizens from both those states who are exercising their rights elsewhere), and where EU law has now – as it has since 1993 – stepped into the political domain by requiring that EU citizens should be able to vote in local elections under the same conditions as nationals on the basis of residence in the host state.

The question of how continued EU membership might occur can be left to one side, but for these purposes let us assume that Scotland and the rest of the UK will both be members, with separate citizenship regimes, where such citizens would then in turn also (continue) to be EU citizens. EU law does not as

such constrain the new state in relation to the choices that it makes about who are its new citizenry and how citizenship would be passed on through the generations, but the broader EU context, and the rights that are held by current EU citizens (both UK citizens and citizens of other Member States) does have significant potential to influence key issues, including the relationship between the status of the citizen and the exercise of various kinds of voting rights.

Here in brief are some of the main issues:



EU citizens would vote in the referendum under the current franchise proposals. One reason why the local/Scottish parliament electoral franchise is being chosen is doubtless because it is wholly residence based and avoids the question of external voters (unlike the Westminster franchise). Unless a new franchise/register is invented (e.g. to exclude EU citizens and perhaps also Commonwealth citizens) then this seems to be the most likely outcome. The question arises as to what happens to this group after independence. Would they be included in the franchise either by (a) being included within the definition of a Scottish citizenship based on residence or (b) being given the right to vote in national elections? While it seems entirely plausible that such rights would be given to Irish and Commonwealth citizens, by extrapolation from the current state of UK and Irish electoral law, both of which give the citizens of the other state the right to vote in national elections, it would be a novelty for an EU Member State to give the right to vote in national elections to all other resident EU citizens, under the same conditions as nationals.

If Scotland does decide on an inclusive residence base, this could include also lawfully resident and settled third country nationals who at present may not yet qualify for UK citizenship, or who may have decided not to take it. If Scotland effectively ‘naturalises’, through an inclusive approach to residence, a large group of third country nationals, it thus gives them the right to exercise EU citizenship rights, including the rights of free movement and residence, and the right to work, in all other EU Member States. Similar issues could also arise were Scotland to be externally inclusive with its citizenship acquisition, giving citizenship to descendants of emigrants who do not currently qualify for UK citizenship because of limits on intergenerational transfer of UK citizenship. Such issues are a matter of concern to other EU Member States, and states are under an obligation to consult with each other on such matters.

In the recent case of [Rottmann](#), the European Court of Justice has stepped into the tricky territory of national sovereignty in relation to the determination of acquisition and – in that case – loss of citizenship. The Court has made it clear that while this is in principle a matter for national law, none the less states must act in such a way that a person who is an EU citizen is not deprived of substantially all the rights of EU citizenship. This could affect decisions about limiting the scope of Scottish citizenship to external citizens, in case the UK also takes action to try and limit the number of external citizens that it might acquire as a result of Scottish independence and the moving of the boundaries of the state. This issue would need to be carefully managed in order to avoid possible cases of statelessness, which is also a factor in relation to the application of international law (see below).

More generally, EU citizenship has become a factor in the Scottish independence debate. It has been suggested by some commentators that one reason why Scottish membership of the EU would persist essentially automatically after independence is because Scottish citizens have a right to EU citizenship and their rights need to be protected. This sort of principle can be derived from the work of the Commission. I discussed this further in an earlier [short paper \(pdf\)](#).

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There are also two principles of *international law* that constrain the definition of the scope of citizenship regimes, and these concern the avoidance of statelessness and the prohibition on discrimination (especially as established in the European Convention on Human Rights). Scotland would have a free choice as to whether it wished to sign up to various treaties on nationality matters to which the UK is not a party, such as the [European Convention on Nationality](#).

Citizenship and relations across these islands

Existing UK citizens in Scotland would continue to hold UK citizenship unless the (R)UK government changed the rules on holding UK citizenship. It has not hitherto been the UK's practice to deprive people of citizenship because they leave the UK territory; the question is whether it is different because it would be the UK territory that, in a sense, has left them. If the rest of the UK was seen as a new, re-constituted state which itself must define its citizenry from scratch, then it might be possible, via intergovernmental negotiations, for these two new states to 'carve up' the existing UK citizenry. This does not seem to be what the Scottish Government envisages, because it often talks about new Scottish citizens having the right to opt (i.e. presumably to choose to be 'British' and/or 'Scottish') and about the importance of dual citizenship. Experience with the creation of new states highlights that whether people choose to 'adopt' new citizenships that they are given after birth as a result of the establishment of a new regime of citizenship tends to be the result mainly of pragmatic considerations. These include access to travel documents, political and socio-economic rights such as the right to live and work in more than one state, or to welfare rights, perhaps with dash of 'identity' thrown in. For those who voted against independence, would taking a Scottish passport be seen as approving separation after the event?

Obviously there have been precedents when the Dominions and the colonies (as well as Ireland) became independent from the UK (although these almost all predate the modern conception of UK citizenship), but the physical co-location of Scotland with most of the rest of the UK on the same island, the high levels of mobility, the factor of common EU membership, and the arrangements that have been made in relation to citizenship in Northern Ireland (where persons can opt for either or both UK and Irish citizenship) suggest that similar types of arrangements might need to be made for Scotland and the UK. A mass deprivation of UK citizenship from Scottish residents who are Scottish citizens by operation of law might prove to be politically tricky and legally problematic for the UK authorities. In practice, an arrangement based on choice for individuals (hence seeing citizenship as a voluntary act), plus resolution of how electoral rights might play out are likely to be the options taken forward in intergovernmental negotiations between the two states which would then be enshrined in legislation. In that context, dual citizenship may help to maintain flexibility. The UK has a strong tradition of tolerating dual citizenship both for the children of mixed citizen parentage and for migrants (immigrants and emigrants). This would be a useful principle for it to continue to adhere to, and for Scotland also to adopt, although this could be at the cost of significant numbers of external citizens over a number of generations, if Scotland decides to give an opt-in to people born in Scotland (or their children/grandchildren) or to those with long residence but who no longer reside in Scotland.

How to manage the transition to the new citizenship regime?

The majority of the examples of state dissolution in post Second World War Europe have involved either federal states (Czechoslovakia, Yugoslavia, Serbia-Montenegro) with a 'state' level as well as a 'federal' level of citizenship on which to base the allocation of citizenship, or states where there is a historical

tradition of statehood to which reference can be made. Scotland does not fall into either of these categories. This complicates the process of determining the substantive principle of who to include should be based (see above), but also the pragmatic issue of who the citizens actually are, e.g. through a registration process which would not be seen as being in the bureaucratic traditions of the UK. It might be seen as partially akin to the electoral registration process, or indeed – more controversially – to the poll tax registration process that was so contentious in Scotland in the 1980s. Whereas in Yugoslavia there were republic level registers of citizens (however incomplete and inaccurate at times) to fall back on as a first cut to determine who were the citizens, in Scotland this would not be the case. This would become particularly complicated if any element of external citizenship were to be permitted, because while it might be reasonably certain to determine the current residents (with or without UK citizenship), the task of determining external citizens claiming Scottish citizenship on the basis of birth would be a challenging one and would leave open huge questions as to exactly how many Scottish citizens there really might be. One might suggest that nothing need to be done until a person ‘claims’ Scottish citizenship by seeking to vote as a Scot or to obtain a Scottish passport, but a new state is likely to want to know what the pool of actual and potential citizens might be in order, for example, to be able to say how many votes or MEPs it should or could lay claim to within the European Union. It is worth noting that the history of Yugoslavia and its successor states indicates that it is often the bureaucratic processes of registration (e.g. for people who do not clearly fall within the new legislative definitions), rather than the legislative statements about the scope of citizenship themselves, which have been the most contentious and fraught aspects of the whole process. It is to be hoped that these can be avoided in the event of Scottish independence by careful future planning and by cooperation between the relevant authorities of the two states.

Sources

This short note is based upon my own and colleagues’ research on EU citizenship, the rules of acquisition and loss of citizenship in European states, and the specifics of citizenship in the successor states of the former Yugoslavia. Further information can be obtained, in particular, from the following sources:

The [EUDO Citizenship Observatory](#), the web magazine [Citizenship in South East Europe](#) and the website of the [CITSEE project](#).

[CITSEE Story](#) [Former Yugoslavia](#) [Citizenship](#) [devolution](#) [dual nationality](#) [Referendum](#)
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**WithoutHeritage** • a year ago

I am 29 and I was born in Glasgow in Scotland. The citizenship rule has changed in the U.K a year before I was born and birth in itself was longer sufficient to grant citizenship. I can not explain to you how saddening this is. I have struggled with this issue all my life. I loved the land deeply and felt it is where i came to be. Its my place of birth. It surely must mean to me more than anything or ant other place. I tried every legal way possible to claim citizenship. I tried using my parents old passports and entry dates(they are not citizens). Frankly towards the end, I felt rejected by the country that brought me to life, specifically my beloved Scotland. I still worship its ground despite that. I hope an independent Scotland would grant its children the right to bear its name and defend it and be proud of it, and its heritage.

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**Tern** ➔ WithoutHeritage • a year ago

Are you actually in exile now? What, if so, is the Yes campaign doing for you? I am in horror at the thought. Keep the details online here and elsewhere, in as many places as possible. Exclusion from the country is a race hate atrocity. I will vote whichever way gives us the more liberal immigration policy particularly for aiding the diaspora's return, at present time of writing this means Yes but I fear they could compromise with the tabloids and blow it.

Scotland is your country because it is the background to your sense of place in the world, it is, your location of home tie given you by your life circumstances. I need to be pedantic in pointing out it comes from those things, in the life you have experienced and lived, rather than from the arbitrary location of one past event you can't remember. My place of birth is a loathed disowned vomit thoroughly buried down a hole, that a person commits race hate if they associate me with in any way. We are a dispersed nation, 20 million of us were born in exile, and birthplace racism, the school bully type bigotry of regarding country as dictated by birthplace, is a genocide towards the Scots as it defines most of us out of existence and makes the Clearances win. Also divides families and siblings.

This fact is not going to take anyone's country away from them, everyone whose country chances to match their birthplace also has other definable ties of life to that country, that are the actual cause of their identity that it is their country.

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**WithoutHeritage** ➔ Tern • a year ago

Yes Tern, I am in exile now. I live in America. I would love nothing more in this life than to return to Scotland. Why invest my skills, time and effort towards building somebody elses country, when I can build my own? Why would I pay taxes to a foreign country when I can happily give to Scotland? I live in America without a sense of identitv. I want to belong and live and breathe the

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